82-6577

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1983

NO:

HAROLD GLENN WILLIAMS,

Petitioner

-vs-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

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The Petitioner, Harold Glenn Williams, by Robert B. Smith, Attorney at Law, respectfully prays that a Writ of Certiorari issue to review that certain Judgment and Opinion of the Supreme Court of Georgia entered in the above-captioned proceeding on February 16, 1983.

TRANSCRIPT OF EVIDENCE AND RECORD

Transcripts of the pre-trial proceedings (cited as TAM-), transcripts of trial (cited as T-vol.-), the record (cited as R-) and the record subsequent to sentence (cited as RA-) and of the Supreme Court opinion (cited as S-) appear in the Appendix hereto.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial Court erred in ruling, pursuant to the Jackson-Denno hearing that the statement of the defendant made on November 12, 1980, was made without hope of reward in any form utilized.

2. Whether the trial Court erred in admitting into evidence the statement of the defendant made on November 12, 1980.

3. Whether the trial Court erred in admitting into evidence a certain peace warrant (State's Exhibit No. 2) sworn out by the deceased Archie S. Lane against the defendant.

4. Whether the trial Court erred in admitting into evidence multiple photographs of the scene and body, marked as S-12, S-13, S-14, S-15, S-16, S-17, S-17, S-18, and S-19.

5. Whether the trial Court erred in admitting into evidence testimony by the prosecuting police officer that he had furnished a copy of defendant's statement made on November 12, 1980 to Defense Counsel.

6. Whether the trial Court erred in failing to direct a verdict in favor of the defendant on Court 1 of the indictment-Burglary.

7. Whether the trial Court erred in failing to direct a verdict in favor of the defendant on Count 11 of the indictment-Murder.

8. Whether the trial Court erred in charging the jury on previous quarrels between the defendant and the deceased to show state of mind of the defendant.

9. Whether the trial Court erred in allowing statements made by the District Attorney during the closing arguments of the sentencing phase of the trial, that the defendant's act was that of a trained U.S. Marine, a man who was trained to kill, a man who was trained to the point that you can even conclude that he enjoyed killing.

10. Whether the trial Court erred in failing to charge the jury in the sentencing phase of the trial, that in order for them to recommend the death penalty, the State must prove beyond a reasonable doubt that the defendant actually killed the deceased or intended or contemplated that the deceased's life would be taken.

11. Whether the jury verdict in the sentencing phase is contrary to law and the weight of the evidence because the evidence does not justify that a burglary was committed and further because the jury found that the offense of murder was outrageously and wantonly vile, horrible and inhumane, and that it involved torture and depravity of mind or an aggravated battery to the victim.

12. Whether the trial Court erred in denying Defendant's Motion for New Trial.

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia dated February 16, 1983 in Case Number 38922 (citations unavailable) appears in the appendix hereto.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). The judgment sought to be reversed was rendered by the Supreme Court of Georgia on February 16, 1983.

CONSTITUTIONAL PROVISIONS INVOLVED

A. The Sixth Amendment of the United States Constitution provides, inter alia, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime was committed....."

B. The Fourteenth Amendment of the United States Constitutional provides, inter alia, that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law....."

STATEMENT OF THE CASE

This case concerns the guilt-innocence and sentencing phases of a trial held in the Superior Court of Wayne County, Georgia. Petitioner was convicted and sentenced to death for murder and twenty years for burglary, which sentences were subsequently affirmed by the Supreme Court of Georgia in an opinion dated February 16, 1983 in Case Number 38922. (Citations unavailable).

The Defendant, Harold Glenn Williams, was indicted by the Grand Jury of Wayne County for murder of Archie S. Lane and the burglary of his residence. (R-1-2). The primary evidence at the trial of the case for the State was the testimony of Deanna Glass Williams, and a statement of the defendant. The evidence showed that the defendant was the grandson of the decedent (T-III-10), and that their relationship had always been like a father-son relationship until between eight and nine months before the incident in question. (T-III-29,30). Testimony of the decedent's brother, Arvel Lane, was that the only problem ever between the defendant and his grandfather, the decedent, centered around a peace warrant and a note delivered to decedent allegedly at the instance of the defendant, which occurred some eight to nine months prior to the incident in question. (T-III-26-29). Another brother of decedent, Q. Z. Lane, also testified that the only trouble ever between the defendant and his grandfather occurred about the time of the warrant. (T-III-51).

Further testimony showed that the warrant was a peace warrant sworn out by the decedent against the defendant on October 13, 1979 (S-2) before the Justice of the Peace, W. H. NeSmith, who testified that he was wholly ignorant of the circumstances surrounding the warrant (T-III-37), could not remember the testimony at the hearing (T-III-74), and could not recall any actions by the defendant which had put the decedent in fear of bodily harm. (T-III-74). Gladys Beasley, who was decedent's "girl friend" for the last six months of his life, testified that although aware that there had been a "little trouble" between the defendant and decedent some months earlier, she was nonetheless unaware of any residual ill feelings between them prior to Lane's death. (T-III-8).

The uncontroverted evidence derived from defendant's statement was that he and one Dennis Williams had gone to the decedent's residence for the purpose of consummating a drug deal, that upon the arrival of the decedent that the latter had pulled a pistol on defendant, that defendant struck the decedent once with his fist, knocking him down, and that thereupon Dennis Williams started hitting decedent with a pipe. (T-IV-19-21). Defendant's statement further showed that he tried to pull Dennis Williams off of his grandfather and tried to help him. (T-IV-21). Thereafter, Dennis Williams set fire to decedent's house. (T-IV-22). Testimony of the pathologist showed the cause of death of Archie Lane as carbon monoxide poisoning or alternatively trauma from blows to the head. (T-III-102).

Deanna Glass Williams, the then wife of Dennis Williams, testified on behalf of the State that upon the return of the two men to their residence, that they related to her that they had been in a dispute over a drug deal. (T-III-92). She further testified that the defendant "kept telling the truth in front of Dennis," whereas Dennis Williams continued to lie. (T-III-93).

On cross eximination, Mrs. Williams recounted wholesale efforts by Dennis Williams and members of his family to destroy the evidence in the case and further related that she feared for her own life at their hands. (T-III-94-96). Moreover, she testified that according to her understanding the defendant and deceased had struggled and that Dennis Williams had intervened. (T-III-96).

The jury returned a verdict of guilty against the defendant on Count 1 of the indictment, burglary and Count 2 of the indictment, murder. (R-26). The jury then recommended that punishment for murder be death (R-27), and the trial judge sentenced defendant to death on the murder count and to twenty years on the burglary count, to run consecutive with the death penalty. (R-29-31). Defendant then made a motion for new trial, (RA-3-5, 11-13), which was denied. (RA-14). Defendant then filed his Notice of Appeal. (RA-12). The Supreme Court of Georgia affirmed. (S-1-19).

TIME AND MANNER IN WHICH FEDERAL QUESTIONS TO BE REVIEWED WERE RAISED

1. & 2. The admissibility of Petitioner's statement of November 12, 1980 was first raised by a Motion to Suppress (R-35), which was heard by the trial Court on January 20, 1982, in a Jackson-Denno hearing, and the trial Court denied the motion, ruling the statement to be voluntarily made and admissible (TAM-114,R-16). The second time it was raised was in the Motion for New Trial (RA-12), which was denied. The next time it was raised was on appeal to the Supreme Court of Georgia. (S-8-10).

3. The admissibility of State's Exhibit No. 2, a peace warrant sworn against your petitioner was first raised by a Motion in Limine (R-10), which was heard by the Trial Court

on January 20, 1982. (TAM-126-133). The trial Court overruled the motion in limine conditionally. The issue was next raised at the trial of the case. The Court admitted State's Exhibit No. 2 into evidence over defendant's objection. (T-III-75). The admissibility of said peace warrant was next raised on Motion for New Trial (RA-11), which was denied by the trial Court. (RA-14). It was next raised on appeal to the Supreme Court of Georgia. (S-12).

4. The admissibility of certain evidence of multiple photographs of the scene and body was first raised at the trial of the case, (T-III-144-148), which was overruled by the trial Court. (T-III-144-148). The question of their admissibility was next raised in Motion for New Trial (RA-11), which was denied by the trial Court. (RA-14). This issue was next raised on appeal to the Supreme Court of Georgia. (S-12).

5. The admissibility of testimony by the prosecuting police officer as to having furnished a copy of petitioner's statement (of November 12, 1980) to defendant's counsel at trial was first raised in the trial of the case by objection (T-IV-18) which was overruled by the trial Court. (T-IV-18). The question was next raised on appeal to the Supreme Court of Georgia. (S-10).

6. & 7. At the close of the State's evidence, defendant made a Motion for Directed verdict as to both counts of the indictment (Burglary and Murder)(T-IV-55-57), which was denied by the trial Court. (T-IV-55-57). Denial of both motions was assigned as error in the Motion for New Trial (RA-11) which, too, was denied. (RA-14). These issues were raised again before the Supreme Court of Georgia which upheld the trial Court. (S-12-14).

8. Exception to the trial Court's charge as to previous quarrels between the defendant and victim (T-V-20-21) was raised on appeal to the Supreme Court of Georgia (S-12), which upheld the trial Court.

9. The issue of the Prosecutor's inflammatory and prejudicial remarks was first raised in the appeal to the Supreme Court of Georgia, which found no prejudice in such remarks. (S-14).

10. The trial Court's failure to charge the jury that the State had the burden of proof to show Petitioner either actually killed the decedent or intended his death was taken issue with at trial (T-IV-97-108) and on appeal to the Supreme Court of Georgia. (S-14-15).

11. Issue was taken with the imposition of the death penalty upon Petitioner's Motion for New Trial (RA-4), which Motion was denied (RA-14), and upon appeal to the Supreme Court of Georgia. (S-16-17).

12. Petitioner's right to a new trial was first raised by duly filed Motion in the trial Court (RA-4), which was denied. (RA-14). The trial Court's failure to grant a new trial was then raised on appeal to the Georgia Supreme Court. (S-1-19).

REASONS THE WRIT SHOULD ISSUE

1. & 2. THE TRIAL COURT ERRED IN FINDING PETITIONER'S STATEMENT OF NOVEMBER 12, 1980 TO HAVE BEEN VOLUNTARILY MADE AND ADMITTING THE SAME INTO EVIDENCE.

The trial Court erred in ruling, pursuant to the Jackson-Denno hearing, that the statement of the petitioner made on November 12, 1980 was made voluntarily and without hope of reward (R-16), and in admitting said statement into evidence. (T-IV-1[illegible]. According to the testimony of Deputy Sheriff, F. J. Shuman, the chief prosecutor, the statement of the defendant, made on November 12, 1980 was in his presence and the defendant's then attorney, Grayson Lane at the Regional GBI Office in Savannah, Georgia. (TAM-93). Officer Shuman testified that the statement was made without any hope of reward or any promises being made to the defendant to cause the defendant to make a statement to him. (TAM-94). Attorney Grayson Lane testified that he also told the

defendant that "there are no promises here; there are no inducements; there are no hopes of reward or benefit or anything else." (TAM-106). However, Lane further testified that in advising the defendant to make the statement, "I did reiterate in Mr. Shuman's presence that it was my understanding that Mr. Williams would make a statement, that it was my opinion that if he did render the statement, that it would be Mr. Shuman's election and the election of the District Attorney to enter into a plea agreement which I hope to consummate, that might be of benefit to Mr. Williams, but I did, however, make it very clear in specific language that Mr. Shuman was not a part of this agreement, not a part of this understanding..." (TAM-107-108).

Attorney Lane further testified: "... and we had discussed and reiterated again to him in the presence of Mr. Shuman to the effect that it was my evaluation and I felt like his, that if he were to make a certain statement to Mr. Shuman that my client and I arrived at, that I felt as though, I felt on my advice to him as though it were going to be very clearly in his benefit to do so with regard to a possible negotiated plea in the case." (TAM-108). Further, Attorney Lane, testified: "Q. All right. Was there anything at that time, in your opinion, in representing Mr. Williams, was there anything at that time which would in any way lead Mr. Williams to believe that this statement would lead to a plea agreement? A. Well, I felt that that is probably what he honestly felt, and I believe that that is probably what he honestly felt or hoped based--and the nuance I'm trying to draw here is-exclusively on my discussions with him, which were not in any way intimated to him or from me as being tied in with any discussions whatsoever with the District Attorney or the police." (TAM-110).

Admissions and confessions must be freely and voluntarily made, not induced by another by the slightest fear of punishment or the remotest hope of reward. Moore v State, 222 Ga. 748, 751. (1966).

In Askea v State, 153 Ga. App. 849, 851, the Court said that when an interrogating officer tells a defendant that telling the truth would "probably help in court," such holds out some hope of reward. In the case sub judice, what we have is a police officer and attorney telling the defendant there are no promises or hopes of reward for making a statement, on the one hand, and that a negotiated plea would be worked out, if he makes the statement, on the other. The fact that Officer Shuman never mentioned anything about a plea is immaterial in this case. He was present when Attorney Lane told this to the defendant and never made any comment to the defendant to the contrary, thereby implying that such statements were correct.

It is defendant's contention that these equivocal statements made to defendant, by his attorney in the presence of the police officer fall within the holdings of the Moore and Askea, decisions supra, and thus the trial Court erred ruling that such statement by the defendant was freely and voluntarily made and admitting the same into evidence at the trial of the case.

3. ADMISSION INTO EVIDENCE OF A PEACE WARRANT SWORN AGAINST PETITIONER BY THE DECEASED WAS ERROR, ABSENT PRIOR PROOF OF CIRCUMSTANCES UPON WHICH THE WARRANT WAS ISSUED.

It is the contention of the Petitioner that the trial Court committed reversible error in admitting into evidence, over objection, a certain peace warrant sworn against the petitioner on October 13, 1979 by the decedent. That peace warrant had been the subject of a Motion in Limine during the pre-trial stage of the case.(TAM-126-133). It is quite telling that the Presiding Judge at those pre-trial proceedings conditioned his overruling of the Motion in Limine upon there being "evidence of the facts surrounding the peace warrant...presented prior to any evidence concerning the peace warrant itself." (R-10).

In light of the restrictions imposed in the pre-trial state of the case, the evidence adduced at trial concerning these "facts" was of crucial importance. Gladys Beasley, who was the decedent's "girl friend" for the last six months of his life testified that although aware there had been a "little trouble" between the petitioner and the decedent some months earlier (T-III-9), she was nonetheless unaware of any ill feelings between them prior to Lane's death. (T-III-8). The decedent's brother, Arvell Lane, likewise, testified to knowledge of a "squabble" between the two (T-III-26) but further stated that incident occurred eight to nine months prior to Lane's death and "That one time" was the extent of the problem. (T-III-28).

The testimony of the Justice of the Peace who issued the peace warrant, W. H. NeSmith, was hardly more illuminating as to the factual background for the warrant. On direct examination NeSmith testified"...he said that he was afraid of his grandson, Glenn Williams, who he took the warrant for." (T-III-71). On cross-examination, however, NeSmith, stated he was wholly ignorant of the circumstances surrounding the warrant (T-III-73), could not remember the testimony at the hearing (T-III-74), and could not recall any actions by the petitioner which had put the decedent in fear of bodily harm. (T-III-74). In effect, NeSmith stated that the facts as related merely tracked the language on the peace warrant printed form. (T-III-73, lines 17-21). At that juncture the peace warrant was admitted, over objection, as State's Exhibit 2.

In arguing in favor of the admissibility of the peace warrant at the pre-trial stage the District Attorney relied upon White v State, 242 Ga. 21, 22 (1978) for the proposition that prior difficulties are admissible as illustrative of bad feelings between the parties. (TAM-127). In narrow terms that principle of law is, of course, correct. However, White itself was based upon Evans v State, 227 Ga. 571, (1971), in which the defendant

within one month of the homicide of his wife, for which he was accused, had (1) struck his victim, (2) pointed a shotgun at her, (3) threatened to kill her, and (4) shot up her sister's house. These acts were both recent and specific in regard to the crime for which he was accused and testimony thereof was deemed admissible.

The Georgia Supreme Court has, since the rendition of Evans and White, clarified the "prior difficulties" question somewhat. Thus, in Boling v State, 244 Ga. 825, 828 (1979) it was held that in a murder trial "evidence of recent prior difficulties between the defendant and the deceased is admissible as shedding light on the state of feelings between the accused and the deceased and showing motive." (Emphasis added). Similarly in Milton v State, 245, Ga. 20, 24 (1980) the rule was recited that "specific previous difficulties" are admissible to show a defendant's motive. (Emphasis added).

The instant case does not accord with the rules for admissibility of evidence of prior difficulties as enunciated by Georgia courts in Boling and Milton, supra. It is uncontroverted that the peace warrant was issued some nine months prior to Lane's death. Further, the only specificity concerning that incident was provided by the defendant's own voluntary account of the incident as testified to by Q. Z. Lane to the effect that the decedent had pulled a gun on the defendant and the latter has fled. (T-III-47).

Taken in the context of the guilt-innocence phase of the trial as a whole the peace warrant had scant probative value, there being absolutely no factual foundation to account for its issuance against the defendant.

Absent a showing of specific acts by the defendant toward the deceased, the warrant was illustrative of no more than Lane's feelings toward the defendant and was of no value to show the state of feelings between them. Moreover, it can hardly be

contended that its admission was not highly prejudicial to the defendant. For the foregoing reasons the defendant asserts that admitting the peace warrant into evidence without compliance with the previous order on Motion in Limine constitutes reversible error, and prevented the petitioner from having a fair and impartial trial, in violation of his Constitutional rights.

5. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY BY THE PROSECUTING POLICE OFFICER THAT HE HAD FURNISHED A COPY OF DEFENDANT'S STATEMENT MADE ON NOVEMBER 12, 1980 TO DEFENSE COUNSEL.

The trial Court erred in admitting into evidence testimony by the prosecuting officer that he had furnished a copy of defendant's statement, made on November 12, 1980 to Defense Counsel. (T-IV-18). Ga. Code, Section 38-201 provides that the evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly. Whether or not this particular Defense Counsel was funished a copy of defendant's statement, which was reduced to writing as much as a year after it was made, is totally irrelevant and in no way relates to the issues in this case. Again, this testimony was sought by the State to imply that this Defense Attorney was a part of this statement. No such evidence existed. As such, this testimony was extremely prejudicial to the defendant, and constituted reversible error. Such admission violated petitioner's due process rights and prevented him from having a fair and impartial trial.

4. ADMISSION INTO EVIDENCE OF THE STATE'S PHOTOGRAPHIC EXHIBITS WAS HARMFUL ERROR WHICH GREATLY PREJUDICED PETITIONER

Petitioner avers the trial Court erred in admitting, over objection, States's Exhibits 12-19 inclusive. These exhibits consisted of both color and black and white photographs of the decedent, both at the crime scene and at the Wayne Memorial Hospital

where an autopsy was performed upon his body. These photographs, purportedly offered in evidence to depict the crime scene and nature and location of wounds inflicted upon the decedent (T-146-148), were palpably repetitious, cumulative in nature and most certainly prejudicial to the Petitioner, Harold Glenn Williams. The Petitioner asserts that this series of photographs was introduced solely to inflame the passions of the jury and that such was the precise result of the photographs' admission into evidence.

In particular, State's Exhibit 13 was offensive to the principles of justice upon which this legal system is based. That photograph portrayed the decedent nude with his genitalia exposed and was illustrative of no issue at all in the trial of the case. Inasmuch as the number and type of wounds inflicted, all of which were about the head, had already been clearly established both by the testimony of the pathologist who performed the autopsy (T-III-100-102) and by the admission of other photographs, State's Exhibit 13 could have had no other purpose than to inflame the jury. The merest perusal of State's Exhibit 13 is compellingly convincing of the truth of this assertion.

Even granted the broad latitude afforded prosecutors under Georgia law in regard to the admissibility of photographs in the trial of a criminal case, there, are nonetheless, limits to that liberality. Further, it can hardly be gainsaid that the most scrupulous and meticulous of care should be taken to perserve the rights of one on trial for his very life, as was the Petitioner herein. To do otherwise would clearly be an abuse of an accused's constitutional rights.

Indeed, the existence of abuse in this regard has not gone unnoticed by the Georgia Supreme Court. Chief Justice Jordan quite cogently recognized the situation in Florence v. State, 243 Ga. 738, 741, n. 1 (1979) in stating that "To this writer it appears

that some prosecuting attorneys are taking license with the very liberal policy of this court in refusing to find reversible error in the use of photographs. The use of photographs should be limited to only those which are relevant and illustrative of the issues." (Emphasis added). The defendant strongly avers that the Trial Court's failure to heed the admonition of the Chief Justice constitutes reversible error.

As State's Exhibit Numbers 6, 9, 10 and 11 clearly depicted the scene and the decedent, the introduction of State's Exhibits 12-19 inclusive was clearly intended to prejudice the defendant as they were not illustrative of the issues in the case. As a consequence Petitioner's right to trial before an impartial jury was violated. Moreover, the Georgia Supreme Court in its affirmance recognized that admitting such was erroneous but chose to find no reversible error in light of other circumstances.(S-12). Petitioner urges that in the trial of a case involving the ultimate penalty under law, the imposition of that penalty must be free from the taint of such error.

6. and 7. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT OF NOT GUILTY AS TO BOTH COUNTS OF THE INDICTMENT-BURGLARY AND MURDER

Petitioner avers that the Trial Court erred during the guilt-innocence phase of the trial in failing to direct a verdict as to Count 1 of the indictment-Burglary. (T-IV-55). That Motion for Directed Verdict was predicated upon the absolute dearth of evidence as to the Petitioner's intent to commit the felony of aggravated assault as the time he entered the dwelling house of the deceased, aggravated assault being the underlying felony set forth in the indictment. (R-1).

The evidence adduced utterly failed to show any intent whatsoever to commit aggravated assault. The Petitioner's own statement, the voluntariness and admissibility of which was con-

tested, revealed only that the Petitioner and another were at the home of the deceased to consummate a drug deal and he, struck the deceased only one time, that being occassioned by the deceased's attempting to pull a gun. (T-IV-19-20). Likewise, the testimony of Deanna Glass Williams, hardly favorable to Petitioner, buttresses his story of mutual combat- "him and his grandfather were fighting and the way I understood it, his grandfather started getting the best of him, and Dennis intervened." (T-III-96).

In the light of this testimony, which was wholly uncontroverted and upon which the State relied heavily, the State failed to prove an essential element of the crime charged, i.e., entry with intent to commit aggravated assault. The fact that an assault or battery transpired within the dwelling does not, in and of itself, establish prior intent, and that was precisely the point argued by the District Attorney in opposition to the Motion for Directed Verdict. (T-IV-55, lines 16-17).

This argument is even more compelling in regard to the Trial Court's failure to give a directed verdict as to Count II of the indictment-Murder. Assuming, arguendo, that denial of the Motion for Directed Verdict as to Count 1, was proper, it beggars the imagination to suggest that the Petitioner was present for the joint purposes of committing aggravated assault and murder. The legal inconsistency of such a view is blatant.

For the above and foregoing reasons Petitioner contends that the Trial Court committed error in failing to direct a verdict of not guilty as to Counts I and II of the indictment. As authority for this contention Petitioner cites Solomon v State, 113 Ga. App. 116, 117 (1966) for the proposition that the State must prove beyond a reasonable doubt every essential element of a crime. Petitioner vigorously argues that no rational trier of fact could find guilt as alleged in this indictment, upon the

evidence adduced and, hence, submitting the case to the jury was reversible error. Petitioner, similarly, urges that the Georgia Supreme Court erred in upholding the Trial Court. (S-12-14).

8. THE TRIAL COURT ERRED IN CHARGING THE JURY ON PREVIOUS QUARRELS BETWEEN THE PETITIONER AND THE DECEDENT TO SHOW STATE OF MIND OF THE PETITIONER

The Trial Court erred in charging the jury the following: "Members of the Jury, this Defendant is on trial for the particular offenses charged in this bill of indictment that you will have out for your consideration, and no other charge or charges."

He is not on trial on account of any other alleged offense or offenses and any other evidence in this case with reference to any previous quarrels between the deceased and the defendant are admitted for the purpose of your consideration solely and only under provisions of the law that where knowledge, motive, intent, good or bad faith, or identity, or any other matter dependent upon a person's state of mind are involved as material elements in the offense of which he is on trial.

Evidence of such quarrels or difficulties, if any, are admissible for consideration of the jury insofar only as it might tend to illustrate the defendant's state of mind on the subject involved, if you think it does so illustrate it.

The Court does not intimate or express to you any opinion as to whether or not these quarrels, differences, or difficulties between the defendant and the deceased did in fact exist. You may consider it solely with reference to mental state or intent of the defendant insofar as same is applicable, or refers to, or illustrates that which is embraced in this bill of indict- which you will have out with you for your consideration, and for no other purpose.

In order for you to consider said quarrels, differences or difficulties between the defendant and the deceased, as it relates to the charges for which the defendant is on trial, the said conduct between the parties must not be remote in time to the alleged occurrence, and must be shown by the evidence to have been continuing in nature from the date of such conduct up until the time of the alleged occurrence under investigation." (T-V-20-21).

The only evidence of any quarrels between the deceased and petitioner centered around a warrant taken out against the petitioner on October 13, 1979, some nine months prior to the occurrence alleged in the indictment, and a note allegedly from petitioner delivered to the deceased a few days after the warrant. (T-III-29). All of the testimony of the State's witnesses was that these were the only two times that there had ever been a squabble between the defendant and his grandfather, the deceased. Gladys Beasley, the deceased's "girl friend" for the last six months of his life testified that although aware there had been a "little trouble" between the petitioner and his grandfather some months earlier (T-III-9), she was unaware of any ill feelings between them prior to Archie Lane's death. (T-III-8). She further testified that she and the decedent, Archie Lane, had seen the petitioner on several occasions and detected no problem between them. (T-III-10-12). Arvell Lane, the decedent's brother, likewise, testified to knowledge of a "squabble" between the two (T-III-26) and the alleged note from the petitioner to his grandfather, the decedent, but further stated that the incident involving the squabble and warrant occured eight to nine months prior to Lane's death and the note was delivered several months thereafter, and "that one time" was the only time the petitioner, Glenn Williams, and his grandfather ever had a problem. (T-III-29). Arvell Lane further testified that the relationship of petitioner and his grandfather, the decedent,

was "more like a daddy and a son." (T-III-30). Another brother of the decedent, Q. Z. Lane, also testified that the only trouble ever between the petitioner and his grandfather occurred about the time of the warrant. (T-III-51). There was no evidence, whatsoever, that any problems or squabbles existed during the six months preceding the occurrence in question.

It is recognized that evidence of recent prior difficulties, between the petitioner and deceased is admissible as shedding light on the state of feelings between the accused and the deceased. Boling v State , 244 Ga. 825, 828. However, the undisputed and uncontradicted evidence shows only one dispute, which happened nine months prior to the occurrence. Such cannot be deemed evidence of a "recent prior difficulty." For this reason, the Court erred in giving the above stated charge to the jury, and such violates petitioner's right to a fair and impartial trial.

9. THE TRIAL JUDGE ERRED IN ALLOWING STATEMENTS MADE BY THE DISTRICT ATTORNEY DURING THE CLOSING ARGUMENTS OF THE SENTENCING PHASE OF THE TRIAL, THAT THE PETITIONER'S ACT WAS THAT OF A TRAINED U.S. MARINE, A MAN WHO WAS TRAINED TO KILL, A MAN WHO WAS TRAINED TO THE POINT THAT YOU CAN EVEN CONCLUDE THAT HE ENJOYED KILLING

Petitioner assigns error to certain highly inflammatory remarks made by the District Attorney in his concluding argument to the jury during the sentencing phase of the trial. These remarks were made in response to defense counsel's efforts to utilize the defendant's exemplary military record as a mitigating circumstance in the case, a record which showed outstanding service as an honor guard at both Camp David and the White House. (T-V-75-80).

To this the District Attorney responded callously: "And you've got every right to conclude that the only thing they do teach you in the Marine Corps in how to kill." (T-V-84). Nor was this the sole appeal to that tragic and sorry convulsion of

anti-military sentiment and anti-patriotism that has, regrettably, scarred this country in the wake of the Vietnam debacle. Later this rhetorical flourish occurred: "Or is that not the act of a trained U. S. Marine, a man who was trained to kill, a man who was trained to the point that you can even conclude that he enjoyed the killing." (T-V-87). One can scarely conceive a more pointed appeal to a grossly distorted prejudice which undeniably exists.

It is true that no objection to these statements was made during argument; nonetheless, the defendant urges this Court to review the inflammaroty and prejudicial nature of these remarks under the authority of Gilreath v State, 247 Ga. 814 (1981). There it was held that in a death penalty case such conduct in the sentencing phase of the trial was reviewable, even absent objection below. (247 Ga. at 835). The defendant urges that these remarks were so inherently inflammatory and prejudicial as to mandate setting aside the death penalty in the instant case.

10. THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY PURSUANT TO THIS COURT'S DECISION IN ENMUND v FLORIDA, CASE NO. 81-2321.

The trial Court erred in failing to charge the jury in the sentencing phase of the trial, that in order for them to recommend the death penalty, the State should prove that the Petitioner actually killed the deceased or intended or contemplated that the deceased's life would be taken. (T-V-97-108). The only evidence in this case surrounding the actual killing was the statement of Deanna Glass Williams, who places her ex-husband, Dennis Williams and the Petitioner at the scene of the occurrence, (T-III-89-97), and the statement of the petitioner, made on November 12, 1980. According to Officer Shuman, the petitioner stated that Dennis Williams was the one who beat the decedent over the head with a tire tool, that he, the Petitioner, had stopped the other man from beating Lane, that he tried to look

after Lane, that Dennis Williams set the house on fire, and then they left. (T-IV-21,22).

The United States Supreme Court in Earl Enmund v State of Florida, Case No. 81-2321, decided July 2, 1982, held that in order for the death penalty to be imposed, the State must show that the accused committed the killing or intended or contemplated that life would be taken.

The trial Court in this case failed to charge this to the jury. Rather, the trial Judge in his charge on the guilt-innocent phase of the trial charged on parties to a crime (T-V-18) and in the sentencing phase charged on arson. (T-V-101). In both of these portions of the trial Court's charge, it would be very easy for the jury to conclude that an "accomplice" to murder can also be given the death penalty. Because of the evidence adduced during the trial and the trial Court's charge during both phases of the trial, it was reversible error not to charge the principle of law set forth in the Enmund case. Petitioner urges that the failure of the Georgia Supreme Court to find Enmund applicable to this case (S-15) was error and that the imposition upon him of a death sentence was unconstitutionally violative of his right to a fair trial.

11. THE JURY VERDICT IN THE SENTENCING PHASE IS CONTRARY TO LAW AND THE WEIGHT OF THE EVIDENCE BECAUSE THE EVIDENCE DOES NOT JUSTIFY THAT A BURGLARY WAS COMMITTED AND FURTHER BECAUSE THE JURY FOUND THAT THE OFFENSE OF MURDER WAS OUTRAGEOUSLY AND WANTONLY VILE, HORRIBLE AND INHUMANE, AND THAT IT INVOLVED TORTURE AND DEPRAVITY OF MIND OR AN AGGRAVATED BATTERY TO THE VICTIM

The jury verdict in the sentencing phase is contrary to law and the weight of the evidence because the evidence does not justify the conclusion that a burglary was committed and further because the jury found that the offense of murder was outrageously and wantonly vile, horrible and inhumane

and that it involved torture and depravity of mind or an aggravated battery to the victim, (T-V-110-111; R-26). As stated previously, there was absolutely no evidence, nor could any have been reasonably inferred, that the defendant entered the decedent's dwelling with the intent to commit a felony, to wit, aggravated assault, as set forth in the indictment. It is recognized that intent can be inferred from the acts of the accused, but from the evidence submitted, there cannot be inferred intent to commit assault and murder at the same time. Under the evidence either intent to commit aggravated assault or intent to commit murder might be inferred, but not both. If this be the case, then the death penalty can be given for all murders, regardless of the circumstances. The State could always say that the defendant committed aggravated assault in that he assaulted the victim with intent to kill, and when the victim died he then also committed the offense of murder. This argument might seem ludicrous at this point, but this is exactly what the State has done in the case at bar. Such is clearly erroneous and on this ground the death penalty should be set aside.

Secondly, the jury found that the offense of murder was outrageously and wantonly vile, horrible and inhumane, and that it involved torture and depravity of mind or aggravated battery to the victim. Such a verdict ought to be totally disjunctive. What did the jury find? Did the jury find that the offense involved torture, depravity of mind or aggravated battery? In the most serious of all punishments, it should be incumbent on a jury to make a specific finding on this "catch-all" and vague definition of an aggravating circumstance. The evidence in this case unequivocally shows that no torture was present, nor aggravated battery committed. Further, it is contended that a jury cannot be expected to determine what is or is not depravity of mind. It is respectfully submitted that if all the Justices on this Court were asked what is depravity of mind, different answers would be given

by each. Under the Georgia death penalty statute depravity of mind, like beauty, is wholly in the eye of the beholder.

The short shrift given this line of argument by the Supreme Court of Georgia in affirming would perhaps be more understandable had that august tribunal not used the exact same reasoning in setting aside a death penalty in Phillips v. State, 250 Ga. 336 (1982). There the defendant, having shot his estranged wife four times (in the shoulder, ear, back and side of the head) and killed her, was tried without a jury, convicted and sentenced to die.

The death penalty was imposed by virtue of the Court's finding, first, the act to be "outrageously or wantonly vile, horrible and inhuman." This Court has already noted that persons of ordinary sensibility would likely find the same in every murder. Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980).

Second, the judge, as trier of fact, found the second component of Ga. Code 27-2534.1 now O.C.G.A. 17-10-30(b) (7) in that the crime involved torture and depravity of mind. There are three possible "elements" of this component, torture or depravity of mind or aggravated battery. The Georgia Supreme Court summarily rejected the argument that mere suffering of pain and anticipating death constitute such physicial or psychological abuse as to support a finding or torture or depravity of mind. 250 Ga. at 340-341. Nonetheless in the case sub judice, decided three months later, strikingly similar facts (close relationship of parties, estrangment, multiple injuries) were held to justify finding such. (S-16, N. 11; S-17).

The only arguable distinguishing facts between Phillips and Williams are the number of wounds (four compared to ten) locale of the crime (school compared to residence) and weapon employed (rifle compared to tire iron). To distinguish crimes on the basis of factual nuances such as these seems merely to place

a premium on the efficiency of an alleged murderer in his choice of weapon and utilization of the same.

Further, Petitioner urges that if a learned trial judge, as in Phillips, can fail to understand the complexities of Georgia's death penalty statute, the same must be beyond the ken of a jury of laymen, as in this case. Moreso, in this case since the jury was improperly charged to begin with.

The Georgia Court's ability to distinguish between Phillips and the case at bar reflect utilization of a standard that is both arbitrary and capricious. Petitioner avers that the concept of due process which inheres in our judicial system carries with it implicitly that all accuseds will be judged by the same standard of conduct. That is clearly not the case here and hence this sentence ought not stand.

12. DENIAL OF PETITIONER'S MOTION FOR NEW TRIAL WAS ERROR.

Based on the preceding arguments and citations of authority Petitioner was entitled to a new trial and denial thereof was error.

CONCLUSION

WHEREFORE, after an examination of the records of the case and the applicable law the Court should reverese the Supreme Court of Georgia and the Trial Court and order a new trial.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: FEB 16 1983

38922. HAROLD GLENN WILLIAMS v. STATE.

HILL, Chief Justice.

Harold Glenn Williams was convicted of burglary and murder and received twenty years for the burglary and the death penalty for the murder. His trial was conducted under the Unified Appeal procedures set out at 246 Ga. A-1 (1980), as amended, 248 Ga. 906 (1982).

The defendant is the grandson of Archie Lane, the 72 year old victim in this case. The elderly victim did odd jobs to supplement his social security income. The evidence showed that, up to about nine months before the murder, the defendant and his grandfather had shared a father-son relationship and that the defendant had often lived for extended periods with his grandparents. The defendant's grandmother died about 18 months before his grandfather was killed. The state's theory of the case was that the disagreement that led to the victim's death stemmed from the $3000 insurance proceeds of a policy the victim had on his wife's life. By the defendant's own statement to an uncle, the defendant had demanded that the victim pay the money over to a Mrs. Rinehart, and the victim had refused.

In October, 1979, the defendant approached the victim while he was lying in bed to try to force him to pay over the money. Q. Z. Lane testified that the defendant told him

that when he tried to force the victim into paying the money to Mrs. Rinehart, he was confronted by the victim with a shotgun. He pushed the gun up and it went off into the ceiling of the house. The next day the victim, accompanied by his daughter, the defendant's mother, went to a justice of the peace for a peace warrant against the defendant. The defendant and the victim never spoke to each other again according to the witnesses' testimony.

Evidence was introduced, however, that the defendant asked his uncle, Charlie Glenn Williams, to deliver a note to the victim and that Charlie Williams in turn gave the note to the victim's brother, Arvell Lane. Arvell gave the note to the victim and saw the note and heard it read aloud twice. It stated: "Hi, old man. We know how much mamma's life was worth. But how much is your life to you. Its not worth anything. But if you want to keep it! tell Charles yes or no. If yes 3000.00 and I'll tell you where to send it. If no kiss your ass good-by!" This note was found by the victim's family in the victim's car the day after his death.[1]

Adell Bishop testified that about a month or two before the victim's death, he was at Q. Z. Lane's store in Sterling at the same time as the victim when they saw the defendant drive by. The victim left. About 45 minutes later, the defendant came into the store and asked Adell if the victim had left. Adell responded affirmatively; then a few minutes later, the defendant muttered, seemingly to himself: "You reckon grand-daddy's life was worth $3000?"

Q. Z. Lane testified that he saw the victim and the defendant at his store three or four times after the

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[1]The note, when found by the family, had written on it at the bottom in blue ink, the statement: "Grand Son wrote this note & left in Mr. Lane's house." This inscription was not originally on the note, according to those who had seen it at the time it was delivered, and no one could explain who had written it.

"squabble" and that neither one spoke to the other. Before that they had gotten along as father and son.

On June 22, 1980, at 10:35 p.m., the Gardi volunteer fire department was called to the victim's house to put out a fire. Upon entering the house thereafter, the body of the 110 pound, 5'5" victim was discovered lying in the doorway from the kitchen to the living room. The medical examiner testified that the victim had been beaten over the head at least 10 times with a blunt instrument. Though his arm and face were blackened with soot, his body had not burned, but his blood was over 50% saturated with carbon monoxide. This led the medical examiner to conclude that the victim had been alive after the beating and had died from a combination of the skull injuries and smoke inhalation.

An investigation of the scene of the crime revealed that the house had been entered by breaking in through the screen porch and then by prying open the back kitchen door with a screwdriver. The detective also found a note in a box by the front door saying: "Two weeks, Love, Glenn." The detective testified that he had been at the victim's house about 2 weeks earlier in answer to a call by the victim that his home had been burglarized. At that time, the intruder had also entered the victim's porch by splitting the screen and opening the screen porch door, but had entered the house by breaking a window on the porch. Nothing was missing from the defendant's home.

The victim's girlfriend, Gladys Beasley, testified that she and the victim had spent the day of June 22 together going to church and visiting her family, and that the victim had left her home at about 9:30 p.m. to return home and had with him a box of leftover chicken. A box and chicken bones were found scattered around the victim where he lay on the floor. The walls around him were splattered with blood. The state thus theorized that the defendant, and possibly another man, had entered the victim's home and had lain in

wait for the victim to return: that when the victim entered the house he was beaten; the curtains were set on fire, and the two men left as they had come, by motorcycle.

Motorcycle tracks were found behind the house leading through a firebreak to the yard of a church located behind the victim's home in Gardi. A witness, looking out when she heard the fire alarm, saw two men go through a stop sign on a motorcycle headed for Jesup. Deanna Glass Williams, the then wife of Dennis Williams, testified that her husband owned two motorcycles and that on the evening of the murder, the defendant and her husband had come to their trailer in Jesup. She said that the defendant was covered with blood while her husband was not. Her husband told her they had been at a party where there had been a fight over drugs, and that someone had been shot, covering the defendant with blood. They put his clothes in the washing machine. She also said that the defendant told Dennis that if Dennis had not pulled the victim off the defendant, the victim would have killed the defendant: " . . . him and his grandfather were fighting and the way I understood it, his grandfather started getting the best of him, and Dennis intervened. And they had a time killing him." After Dennis left, the witness testified that the defendant went berserk and kept talking about killing his grandfather and how hard it was to kill him.

She also said that her husband's family then flocked in to get rid of the evidence and had thrown his boots, filled with rocks, and a gun into the river, that she was afraid of her husband and his family, and that he wanted to go to Texas to hide but could not get the money. (Dennis Williams was later arrested in Florida and pleaded guilty to voluntary manslaughter, for which he received a 10 year sentence. He did not testify at the defendant's trial.)

Two statements made by the defendant were also admitted into evidence at the trial. In the first, made the day

after the murder, the defendant admitted going to the victim's house and breaking in. He said he received the three scratches on his arm when he reached through the screen door to unlatch the porch door.[2] He said, however, that he then left the house without seeing the victim. At this point, the detective looked down at the defendant's boots, and asked the defendant about the stains he noted there. The defendant then requested to see his lawyer.[3]

The boots were removed from the defendant and the stains were tested and found to be human type A blood with an enzyme PGM factor type 1. The victim's blood was also tested and was type A, PGM-1, a combination shared by 24% of the population.

On November 12, 1980, Detective Shuman again had the opportunity to interview the defendant when he and the retained attorney who then represented the defendant arranged a meeting in the polygraph room at the GBI office in Savannah.[4] The defendant not only was given the Miranda [v. Arizona, 384 U. S. 436 (86 Sc 1602, 16 LE2d 694) (1966)] warnings, but also was clearly told by his own attorney that no promises had been made for his statement and that he was free not to say anything. The attorney did advise him to make the statement as part of a well-calculated risk that

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[2]Detective Shuman photographed these scratches and the photos were in evidence at the trial. Additionally, the defendant was examined by a doctor and the doctor testified that the defendant, on the afternoon after the victim died, had bruises with some swelling and abrasions between his thumb and index finger and bruises and scratches on his left thigh, which appeared to be from 12 to 24 hours old.

[3]Regarding the officer's testimony that the defendant requested to see his lawyer, see Durden v. State, ___Ga.___ (3,4) (No. 38873, decided Nov. 16, 1982). In view of defendant's incriminating admission over three months later, we find the officer's reference to defendant's request for counsel to be harmless beyond a reasonable doubt.

[4]No objection was made to this mention of the polygraph room, and we find no harmful or prejudicial effect.

Detective Shuman might then enter into a plea agreement. (The defendant later withdrew his plea of guilty and an attorney was appointed to represent him at his trial.)

In his statement, the defendant said that he and another man had gone to Gardi on a red motorcycle a man had offered to him at a greatly reduced price. They had stopped at the store next to the victim's house; then, because he and the victim had an ongoing drug deal whereby the defendant picked up money and drugs at the victim's home, they broke into the porch when they found it locked, and into the house, to see if drugs or money had been left out for a pickup. He further stated that while the other man was plundering around the house, they heard someone come in and the defendant hid in the bathroom. When it turned out to be only the victim with a chicken box in his hand, the defendant spoke up, but the victim went for his pistol. They started to fight, and the defendant knocked the victim down, but never hit, beat or kicked him anymore after that. According to the defendant, the other man, Dennis Williams, then came running in from the other room and beat the victim in the head with a tire tool. After the defendant stopped Dennis from beating the victim, they wrapped the tire tool and the pistol in a fuzzy blue commode cover. According to the defendant's statement, Dennis Williams set the house on fire, and after the defendant tried to help his grandfather, they returned to Jesup on the motorcycle by another route. Dennis Williams got rid of the motorcycle.[5]

After the state rested, the defense also rested without presenting any evidence during the guilt phase of the trial. After the trial court's charge, the jury convicted the defendant on both the burglary and murder counts.

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[5]The motorcycle was never found, and no identifiable fingerprints were discovered in the house or on an empty lighter fluid can found in the bedroom where the fire started.

During the sentencing phase, the state presented no additional evidence. The defendant called three ministers to testify to his good character. Then his mother, who was also the daughter of the victim, appeared on behalf of her son. She stated that she and the victim were very close and that she had accompanied her father to obtain the peace warrant against her son. She explained that the victim told her that the defendant had walked in and hit him, while he was lying in his bed, and that he would have killed the defendant, but had tripped in the bedspread while getting his shotgun and it had gone off into the ceiling.

She also testified that her husband died when the defendant was twelve years old and her younger child was two months old; that the victim and his wife had moved in with her to keep the children and the house while she worked; that the defendant was upset by the death of his grandmother, whom he felt was not given proper medical care, and that this was the source of the defendant's problem with the victim.

The defendant's mother also exhibited the honorable discharge the defendant earned as a United States Marine in October, 1978, and Good Conduct and Presidential Fitness awards, as well as a President's Award for service in the White House and at Camp David where he had guarded the President.

After argument and charge the jury imposed the death penalty for the murder, finding that the murder was committed while the defendant was engaged in the commission of a burglary, OCGA § 17-10-30-(b)(2), and was "outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind, or an aggravated battery to the victim, Archie Lane." See OCGA § 17-10-30(b)(7). The jury did not find the additional aggravating circumstance charged that the murder was committed while the defendant was engaged in the commission of arson, OCGA

§ 17-10-30(b)(2). The defendant was sentenced accordingly, and after the denial of his motion for new trial, this appeal followed.

1. In his first and second enumerations of error, the defendant argues that the trial court erred in holding that his November 12, 1980, statement was made without hope of reward, and in admitting it into evidence. He relies on the testimony during the Jackson-Denno hearing by the retained attorney who represented him at the time who said: "'Let me get a couple of things clear. There are no promises here; there are no inducements; there are no hopes of reward or benefit or anything else.' Because of an understanding that I had over a long period of time derived to [the defendant] about what we would attempt to do in his defense in this case, I advised him that he should not expect anything whatsoever from the making of this statement. And I advised him if he didn't want to, we'd all get back in the car and we'd go home." After stating that the defendant made the statement freely and voluntarily, he continued: "The only thing that I think I ought to add in all candor is that, in advising [the defendant] to make the statement and mentioned again to Mr. Shuman, I did reiterate in Mr. Shuman's presence that it was my understanding that Mr. Williams would make a statement, that it was my opinion that if he did render that statement, that it would be in Mr. Shuman's election and the election of the District Attorney to enter into a plea agreement which I hoped to consummate, that might be of benefit to [the defendant], but I did, however, make very clear in specific language that Mr. Shuman was not part of this agreement, not part of this understanding, but this was our calculation, not any part of anything he had said or indicated or promised or intimated."

In answer to the question " . . . was there anything at that time which would in any way lead [the defendant] to believe that this statement would lead to a plea

agreement?", the attorney stated: "Well, I feel that that is probably what he honestly felt, . . . and the nuance I'm trying to draw here is--exclusively on my discussions with him, which were not in any way intimated to him or from me as being tied in with any discussions whatsoever with the District Attorney or the police." He also told the defendant: "' . . . Mr. Shuman has no idea what your statement is and he has no idea what your statement is going to be. If there's going to be any discussion in this room about any expectation or understanding as to what's any benefit or hope of reward from this, don't make it. Mr. Shuman owes you nothing. You either make this statement, blank, no promises, no expectations, or you don't."

The defendant contends that the statements of the attorney were equivocal in that the attorney's advice to him was that if he made the statement, the state might negotiate a plea and that advice coupled with the silence of the detective on this point created an inducement by them for him to give the statement with slight hope of reward contrary to OCGA § 24-3-50.[6]

The defendant analogizes this situation to that in Askea v. State, 153 Ga. App. 849, 851 (267 SE2d 279) (1980), where the Court of Appeals held that a statement by a police officer that telling the truth "would probably help him in court" constituted hope of reward and rendered the resulting statement involuntary.[7] We do not agree.

The colloquy quoted extensively above makes clear that the defendant understood the conditions under which his

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[6]"To make a confession admissible, it must have been made voluntarily without being induced by another, by the slightest hope of benefit or remotest fear of injury." OCGA § 24-3-50.

[7]The statement's admission was held to be harmless error, however, since the defendant made a similar statement while testifying at trial. Compare Robinson v. State, 229 Ga. 14 (1) (189 SE2d 53) (1972) (mere admonitions to tell the truth do not render the statement inadmissible).

statement was being made. In Dickey v. State, 157 Ga. App. 13, 14 (276 SE2d 75) (1981), it was held that, where the hope or fear is a product of the defendant's own mind, rather than the result of inducement by others, the statement is admissible. OCGA § 24-3-50, supra. See also Gates v. State, 244 Ga. 587, 590-591 (261 SE2d 349) (1979). Enumerations of error 1 and 2 are without merit.

In enumeration 5, the defendant contends that the trial court erred in allowing Detective Shuman to state that he had furnished a copy of the defendant's November 12, 1980, statement to defendant's trial counsel. He urges that this declaration was irrelevant and prejudicial because it implied that the defense attorney representing him at trial was a part of the earlier statement. It was clear during the trial that the defendant had been represented by a different attorney when he made the November 12, 1980, statement, and we find no error here.

2. The third enumeration of error questions the admissibility of the peace warrant taken out 9 months earlier by the victim against the defendant. At a pretrial motion in limine, the trial court held that the peace warrant would be admissible at trial provided "evidence of the facts surrounding the peace warrant . . . [were] presented prior to any evidence concerning the peace warrant itself."

The evidence at trial showed that the victim and defendant had been involved in a squabble 8 or 9 months prior to the victim's death and that the peace warrant was issued by the justice of the peace because the victim stated he was afraid of the defendant. Although this officer could remember no details surrounding its issuance, he stated that he always considered the evidence adduced before issuing such warrants. However, Q. Z. Lane testified that the defendant told him that the victim sought the peace warrant after a shooting incident related to an effort by the

defendant to force the victim to pay the insurance proceeds to Mrs. Rinehart.

Arvell Lane testified that he knew there had been a "squabble" between the victim and the defendant about 8 or 9 months before the killing and that at that time the victim had called the sheriff from Arvell's house and then Arvell had driven the victim to the sheriff's office to obtain a peace warrant. He also stated that the threatening note was delivered to his house about a month or two after the warrant incident, and that he never saw the two of them together again after that. Adell Bishop testified that the defendant made the statement: "You reckon grand-daddy's life was worth $3,000?" about a month or two before the victim's death, while Q. Z. Lane testified that, although he had seen the victim and the defendant together three or four times at his store after their "trouble", they never again had spoken to each other. And, then there is the somewhat ambiguous, but relevant second note found in the message box on the front of the victim's house: "Two weeks. Love, Glenn."

As we stated in Gunter v. State, 243 Ga. 651, 656 (256 SE2d 341) (1979), and reiterated most recently in Nicholson v. State, 249 Ga. 775 (SE2d) (1982): "In a murder prosecution, evidence of prior quarrels and difficulties between the defendant and the victim, which persist until the time of the killing, thereby shedding light upon the motive of the killing and explaining conduct, is admissible." The issuance of the peace warrant was only one incident, albeit the initial one, in a series by which the state sought to prove the defendant's motive in killing the victim.

We find that the evidence about the peace warrant was an element of the circumstances showing difficulties which persisted until the time of the killing and thus was admissible under OCGA § 24-2-2. The length of time between

the issuance of the peace warrant and the murder, about nine months, does not render the warrant inadmissible. See 2 Warton's Crim. Ev. (10th ed.) § 918, quoted in Milton v. State, 245 Ga. 20, 23 (262 SE2d 789) (1980); see also Nicholson v. State, supra, 249 Ga. 775 (2). We find no error in the admission of the peace warrant into evidence by the trial court. Hales v. State, ___Ga.___ (Case No. 38890, decided October 27, 1982).

By the same reasoning, the trial court properly charged the jury on recent prior difficulties and enumeration of error 8 likewise has no merit.

3. Enumeration 4 raises the propriety of admitting seven photographs, both color and black and white, of the victim at the crime scene, and one during the autopsy. The defendant asserts correctly that four of the photographs were repetitious of others and should have been excluded upon objection. He vehemently argues that the photograph of the victim's nude body taken at the autopsy, showing the victim's genitalia, was irrelevant and was calculated to inflame the minds of the jury. While we agree that the duplicative photos and the autopsy photo should not have been admitted, see Ramey v. State, ___Ga.___ (1) (39061, decided Jan. __, 1983); Florence v. State, 243 Ga. 738, 741 n. 1 (256 SE2d 467) (1979), it cannot be said that their admission constitutes reversible error in light of defendant's two incriminating admissions and the other evidence. Johnson v. State, 238 Ga. 59, 61 (230 SE2d 869) (1976).

4. A challenge to the sufficiency of the evidence under the indictment for burglary constitutes the defendant's sixth enumeration of error. In count one, the defendant was indicted for and convicted of "the offense of Burglary for that the said Harold Glenn Williams . . . did . . . without authority and with the intent to commit a felony therein, to-wit: Aggravated Assault, enter a

dwelling house occupied by Archie S. Lane. . . ."[8] (Emphasis supplied.) On appeal, he claims there is no evidence to support the view that he entered the building with the intent to commit aggravated assault. He urges that neither of his incriminating statements showed an intent to commit aggravated assault. As can be seen from the statement of facts, however, viewing the evidence in the light most favorable to the verdict, it was sufficient beyond a reasonable doubt for a rational trier of fact to find the defendant entered the victim's home with the intent to commit aggravated assault. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). See Ealey v. State, 139 Ga. App. 604, 606 (229 SE2d 86) (1976). The trial court did not err in refusing to grant a directed verdict on this count.

Similarly, in enumeration 7, the defendant urges error in the refusal of the trial court to direct a verdict of acquittal as to murder. It appears that the argument here is that the burglary (entering with the intent to commit the felony of aggravated assault) and murder are inconsistent. However, "[a] person commits aggravated assault when he assaults (1) with intent to murder, to rape, or to rob, or (2) with a deadly weapon. . . ." OCGA § 16-5-21(a). Thus, the two charges are not legally incompatible. See Oglesby v. State, 243 Ga. 690 (3) (256 SE2d 371) (1979). Nor is one a lesser included offense of the other.[9] OCGA §§ 16-1-6, 16-1-7. The jury was authorized to find the defendant

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[8]OCGA § 16-7-1(a) provides: "A person commits burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another. . . ."

[9]The defendant errs in focusing only on the aggravated assault rather than the crime of burglary for which the defendant was indicted and convicted. Under the facts of this case, aggravated assault and murder convictions might merge. However, the same is not true of burglary and murder since proof of additional elements must necessarily be shown to establish each crime. See Oglesby v. State, supra, 243 Ga. at 691 (2).

guilty of murder, Jackson v. Virginia, supra, and the trial court did not err in overruling his motion for a directed verdict on the murder charge.

Enumerations of error 6 and 7 raise no grounds for reversal.

Sentence Review

5. Enumeration of error 9 alleges prejudicial error in the closing argument of the district attorney in the sentencing phase of the trial. During the evidentiary portion of the sentencing phase, the defendant's mother presented evidence relating to the defendant's military record as a member of the United States Marine Corps. In his closing argument, the district attorney said: "You've got every right to conclude that the one thing they do teach you in the Marine Corps is how to kill. . . ." And later, ". . . is that not the act of a trained U. S. Marine, a man who was trained to kill, a man who was trained to the point that you can even conclude that he enjoyed the killing?"

Although we express no approval of this argument, we do not find, as urged by the defendant, that it so appealed to "current anti-patriotic and anti-military sentiments" that the defendant was prejudiced thereby, and find no reversible error. Martin v. State, 223 Ga. 649 (2) (157 SE2d 458) (1967). The district attorney's argument is an obvious overstatement and its factual incorrectness is readily apparent to anyone. Thus, we do not find that it appealed to the passions and prejudice of the jury so as to render the defendant's trial fundamentally unfair. Compare Hance v. Zant, ____ F2d ____ (11th Cir. 1983).

6. In his tenth enumeration of error, the defendant contends that the trial court erred in failing to charge the jury that in order for the death penalty to be imposed the state must show that the defendant "actually killed the deceased or intended or contemplated that the deceased's life would be taken." He relies upon the recent decision in

Enmund v. Florida, ____ U. S. ____ (102 SC 3368, ____ LE2d ____) (1982).

Under the facts of this case we find Enmund v. Florida, supra, to be inapplicable. There, Enmund, the driver of the get-away car in the armed robbery of a residence, was convicted of felony murder and given a death sentence although he was not present at the place where the double killings occurred and no evidence was presented showing the killings were ordered by him or were part of the conspiracy. Accordingly, the United States Supreme Court reversed the death sentence, not because of an error in the charge of the court but because the Supreme Court found that imposition of the death penalty upon Enmund was unconstitutional.

Here, the undisputed evidence showed that the defendant entered the victim's house and, by his own admission, the defendant hit the victim over the head at least once. The jury was charged on the law relating to parties to a crime and that mere presence is insufficient, that intent is a specific element of both of the crimes with which he was charged that must be proved beyond a reasonable doubt, and also that to find the defendant guilty of burglary, the jurors must find that the defendant intended to kill as an essential element of the aggravated assault upon the victim.10 Thus, the jury's guilty verdicts for malice murder and burglary (with intent to commit aggravated assault) reflect a finding by the jury that the defendant intended and participated in the murder, and it is clear that the jury found that the defendant "killed or attempted to kill" and "intended or contemplated that life would be taken," as required to assess the death penalty under Enmund v. Florida, supra. There is no error here.

7. In enumeration of error 11, the defendant again argues that there is no evidence in the record that he

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10See OCGA § 16-5-21(a) and division 4, supra.

entered the victim's home intending to commit aggravated assault, and therefore that one of the aggravating circumstances found, that the murder was committed during the commission of burglary, is not supported by sufficient evidence and thus was not proved beyond a reasonable doubt. For the reasons given in division 4, this argument has no merit.

Likewise, the evidence supports the jury's conclusion that the "offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, and depravity of mind, or an aggravated battery to the victim. . . ." This 110 pound, 72 year old victim was beaten over the head with a blunt instrument at least 10 times, crushing his skull and spattering his blood over the walls and the clothes and boots of his assailant. Still alive, he was left bleeding on the floor, as the house was set on fire, scorching his arms and head. He died of the bleeding caused by these injuries along with carbon monoxide poisoning from inhaling the smoke from the fire. Compare Gilreath v. State, 247 Ga. 814 (19) (279 SE2d 650) (1981).

The defendant argues, however, that because this aggravating circumstance is styled in the disjunctive it is impossible to know what determination the jury made--i.e., whether it found torture, depravity of mind or aggravated battery.[11] He urges that the evidence does not support findings of torture or aggravated battery and that the jury could not know how to determine depravity of mind. The trial court had defined aggravated battery. See Gilreath v. State, supra, 247 Ga. at 836. As can be seen, the evidence

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[11]Defendant points out that the jury was charged incorrectly in the following language: "In that it involved torture and depravity of mind, or an aggravated battery." The "and" does not appear in OCGA § 17-10-30(b)(7). However, we find no harmful error. The charge as given presented a higher test by requiring findings of both torture and depravity of mind rather than either one of them alone, which is all that is necessary under the statute as written. Thus, the misquotation benefited the defendant.

is sufficient to allow a rational trier of fact to find torture[12] or aggravated battery[13] as well as depravity of mind.[14] Hance v. State, 245 Ga. 856 (3) (268 SE2d 339) (1980).[15]

8. After review of the record in this case, including those matters dealt with in divisions 3 and 5 of this opinion, we conclude that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor. OCGA § 17-10-35(c)(1).

9. We find that the sentence of death imposed in this case is not excessive or disproportionate to sentences imposed in similar cases. Our cases show that juries find the death penalty to be appropriate punishment where an adult defendant commits murder during an unlawful intrusion into a private home. See, e.g., Horton v. State, 249 Ga. 871 (14) (295 SE2d 281) (1982), and cases cited in the appendix. Moreover, the brutality displayed by the defendant in this case, and the extremely offensive manner by which he committed the murder (see appendix),

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[12]"Torture occurs when the victim is subjected to serious physical abuse before death." Hance v. State, supra, 245 Ga. at 861.

[13]"An aggravated battery occurs when '[a] person . . . maliciously causes bodily harm to another by depriving him of a member, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof.' [OCGA § 16-5-24(a)]." Hance v. State, supra, 245 Ga. at 861.

[14]"A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

"In determining whether the evidence shows 'depravity of mind', the age, and the physical characteristics of the victim may be considered. See Thomas v. State, 245 Ga. 688 (1980). . . ." Hance v. State, supra, 245 Ga. at 862.

[15]Defendant's final enumeration of error raises the refusal of the trial court to grant the defendant's motion for new trial on grounds reiterated on appeal. Since we have found no reversible error under those enumerations of error, we also find that the trial court did not err in failing to grant the defendant's motion for new trial.

We have reviewed the record pursuant to the Unified Appeal Procedure and find no addressable error not enumerated by defendant.

additionally distinguish this murder from those murders for which the death penalty is not appropriate. Compare Phillips v. State, 250 Ga. 336 (297 SE2d 217) (1982). The similar cases listed in the appendix support the death penalty in this case.

Judgment and sentence affirmed. All the Justices concur.

APPENDIX

Horton v. State, 249 Ga. 871 (295 SE2d 281) (1982)

Berryhill v. State, 249 Ga. 442 (291 SE2d 685) (1982)

Cunningham v. State, 248 Ga. 558 (284 SE2d 390) (1981)

Gilreath v. State, 247 Ga. 814 (279 SE2d 650) (1981)

Cape v. State, 246 Ga. 520 (272 SE2d 487) (1980)

Hamilton v. State, 246 Ga. 264 (271 SE2d 173) (1980)

Bowden v. State, 239 Ga. 821 (238 SE2d 905) (1977)

Hill v. State, 237 Ga. 794 (229 SE2d 737) (1976)

Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975)

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1983

NO. 82-6577

HAROLD GLENN WILLIAMS,

PETITIONER

-vs-

STATE OF GEORGIA,

RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Robert B. Smith
GIBBS, LEAPHART & SMITH, P.C.
P. O. Box 977
Jesup, Georgia 31545
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IN THE SUPREME COURT OF THE UNITED STATES

_____, TERM, 1983

HAROLD GLENN WILLIAMS,

PETITIONER

-vs-

STATE OF GEORGIA,

RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, HAROLD GLENN WILLIAMS, who is now held in a Georgia State Penitentiary moves the Court for an order permitting him to proceed in this Court, in forma pauperis, with his appeal from the judgment of the Supreme Court of Georgia entered in this cause on February 16, 1983, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of said petitioner.

Petitioner's Petition for a Writ of Certiorari is being filed with this motion and petitioner's affidavit.

Robert B. Smith

Robert B. Smith
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P. O. Box 977
Jesup, Georgia 31545
(912) 427-2024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-

HAROLD GLENN WILLIAMS

Petitioner,

v.

STATE OF GEORGIA,

Respondent

AFFIDAVIT OF INDIGENCY

I, HAROLD GLENN WILLIAMS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ___ No ✓

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

_____

_____

b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which you received.

June of 1990 — $800.00

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No ✓
b. Rent payments, interest or dividends? Yes ___ No ✓
c. Pensions, annuities or life insurance payments? Yes ___ No ✓
d. Gifts or inheritances? Yes ___ No ✓
e. Any other sources? Yes ___ No ✓

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own cash, or do you have money in a checking or savings account? Yes ✓ No ___ (Include any funds in prison accounts.)

If the answer is "yes", state the total value of the items owned. $25.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No ✓

If the answer is "yes", describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. N/A

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 4-1-83

HAROLD GLENN WILLIAMS

Sworn to and subscribed to before me this 1st day of April, 1983.

NOTARY PUBLIC

My commission expires:

March 20, 1987

CERTIFICATE OF SERVICE

This is to certify that I have this day furnished the following with a true and correct copy of the attached and foregoing Motion for Leave to Proceed in Form Pauperis and Petitioner's Affidavit by placing said copies in the United States Mail with sufficient postage affixed on each.

Honorable Michael J. Bowers
Attorney General for the State of Georgia
Room 132, Judicial Building
Atlanta, Georgia 30334

Honorable Glenn Thomas, Jr.
District Attorney, Brunswick Judicial Circuit
P. O. Box 416
Jesup, Georgia 31545

This the 14th day of April, 1983.

Robert B. Smith
Counsel for Petitioner

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